83-688

Office - Supreme Court, U.S.
FILED
OCT 26 1983
ALEXANDER L. STEVAS,
CLERK

NO.

in the Supreme Court of the United States

October Term, 1983

CALVIN COOLIDGE GREENE,
Petitioner,

vs.

WHIRLPOOL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

C. MICHAEL WILSON
[Counsel of Record]
J. DAVID TOLBERT
Gerdes, Mason, Brunson & Wilson
Suite 1001 Cameron Brown Building
301 South McDowell Street
Charlotte, North Carolina 28204
704-372-3180

Counsel for Petitioner

QUESTIONS PRESENTED

I.

Whether the notice provision of 29 U.S.C. §626(d), which requires that a charge alleging unlawful discrimination on the basis of age be filed within 180 days of the alleged act of discrimination with the appropriate government agency, is satisfied, where:

(a) No written charge was submitted by the claimant;

(b) Within 180 days of his termination, the claimant went to the appropriate notice agency, where his statement that he believed he had been discriminated against and discharged by his employer because of his age was received.

II.

Whether the notice provision of 29 U.S.C. §626(d) is tolled where an employer fails to post notices setting forth information concerning age discrimination as required by law.

TABLE OF CONTENTS

Page

Opinions below 2

Jurisdiction 2

Statutory provisions involved 3

Statement of the case 4

A. Factual context 4

B. Court proceedings 5

Reasons for granting the writ:

1. The decision below seriously erodes the private enforcement of the Age Discrimination in Employment Act [ADEA] and specifically undermines the purposes of the 1978 Amendments to the ADEA ... 7

2. The decision below causes confusion in the interpretation of the ADEA by conflicting with the precedents of this Court and the decisions in and of other circuits .. 16

TABLE OF CONTENTS (Continued)

Page

Conclusion 20

Certificate of Service 21

Appendix:

A—Order of the Fourth Circuit Court of Appeals, dated August 2, 1983 and Opinion of the Fourth Circuit dated May 31, 1983 ..... App. 1

B—Order and Opinion of the United States District Court for the Western District of North Carolina dated May 7, 1982 .. App. 13

C—Statistical Chart Resident U.S. Population by Age and literacy ..... App. 27

TABLE OF AUTHORITIES

Cases	Pages
Cannon v. University of Chicago, 441 U.S 677, 696-698 (1979)	13, 18
Jennings v. American Postal Workers Union, 672 F.2d 712 (8th Cir. 1982)	18
Kephart v. Institute of Gas Technology, 581 F.2d 1287, 1289 (7th Cir. 1978), *cert. denied*, 450 U.S. 959 (1981)	17
Love v. Pullman, 404 U.S. 522, 527, 528 (1972)	15
Mahasco Corp. v. Silver, 447 U.S. 806, 816 (1980)	12
Moses v. Falstaff Brewing Corp., 525 F.2d 92, 93-94 (8th Cir. 1975)	14
Noto v. J.F.D. Electronics Corp., 446 F.Supp. 92 (F.D.N.C. 1978)	18
Philbrook v. Clodgett, 421, U.S. 707, 713-714 (1975)	18
Posey v. Skyline Corporation, 702 F.2d 102, 105 (7th Cir. 1983)	17
Woodford v. Kinney Shoe Corp., 369 F.Supp. 911 (N.D. Ga. 1973)	13

TABLE OF AUTHORITIES (Continued)

Cases — Pages

Statutes

28 U.S.C. §1254 2

28 U.S.C. §1331 ..... 2, 5

29 U.S.C. §621 *et seq*
(Age Discrimination in Employment
Act of 1967, as amended) 4, 7-11, 14-17

29 U.S.C. §626 (c) 2, 5

29 U.S.C. §626 (d) 2, 3, 5-9
11, 13, 16-18

Legislative History

H.R. No. 95-950, 95th Cong., 2d Sess. 12,
reprinted in [1978] U.S. Code Cong.
& Ad. News 534 14

House Conf. Report No. 95-950, March 14, 1978,
12, *reprinted in* [1978] U.S. Code Cong.
and Ad. News 1806 13

S. Rep. No. 493, 95 Cong., 2d Sess. 1, 12,
reprinted in [1978] U.S. Code &
Ad. News 504, 515 ..... 8, 9

TABLE OF AUTHORITIES (Continued)

Cases	Pages

Miscellaneous

U.S. Bureau of Census, *Statistical Abstract of the United States, 1982-83*, (103 ed.) Washington, 1982, p. 145, p. 27 10

3 C.F.R. 321 (1979) 4

NO.

in the

Supreme Court

of the

United States

October Term, 1983

CALVIN COOLIDGE GREENE,
Petitioner,

vs.

WHIRLPOOL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Calvin Coolidge Greene, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 31, 1983.

OPINIONS BELOW

The opinion of the Fourth Circuit, entered on May 31, 1983, is reported at 708 F.2d 128. It is reprinted in the Appendix, pp. 2-12, *infra*, App. A.

The opinion of the United States District Court for the Western District of North Carolina, entered May 7, 1982, is reported at 538 F.Supp. 352. It is reprinted in the Appendix, pp. 13-26, *infra*, App. B.

JURISDICTION

This civil action, brought pursuant to 29 U.S.C. §626(c) and 28 U.S.C. §1331, commenced in the United States District Court for the Western District of North Carolina. The case was heard and tried in a jury trial by that court and judgment was entered in favor of the plaintiff in the amount of $56,000.00 for lost income, $56,000.00 as liquidated damages, and $43,629.39 in attorneys' fees. A judgment and opinion to that effect being entered on May 7, 1982. 538 F.Supp. 352; App. B, *infra*. The Fourth Circuit reversed on the grounds that 29 U.S.C. §626 (d) required that the plaintiff file a written charge alleging unlawful discrimination and that plaintiff had not complied with the said provision, a judgment and opinion to that effect being entered on May 31, 1983. 708 F.2d 128; App. A, *infra*. On August 2, 1983 the Fourth Circuit entered an Order denying a petition for rehearing, as well as a suggestion for rehearing en banc. App. A, p. 1, *infra*. This petition for certiorari is filed within ninety days of the denial of rehearing. This Court has jurisdiction to review the judgment of Fourth Circuit by writ of certiorari pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

The relevant portions of the federal statutes are as follows:

29 U.S.C. §626(d): No civil action may be commenced by an individual under this Section until sixty (60) days after a charge alleging an lawful discrimination has been filed with the Secretary. Such a charge shall be filed—

> (1) Within 180 days after the alleged unlawful practice occurred; or
>
> (2) In a case to which Section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceeding under state law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the actions and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

STATEMENT OF THE CASE

This action stems from petitioner Greene's termination of employment by the respondent during October 1977. Petitioner alleges that the respondent discharged him from his employment on the basis of age, which action is prohibited by the Age Discrimination in Employment Act of 1967.

A. Factual Context

In 1977 petitioner was 55 years old and was employed by the respondent as a sales territory manager. At that time, the petitioner was terminated from his employment by the respondent. Petitioner, believing that he had been discriminated on the basis of age, thereafter went to the Charlotte, North Carolina office of the United States Department of Labor,[1] where he had a conference with Department of Labor employee Bob Smith. App. B, p. 17, *infra.* Petitioner informed Mr. Smith that he had been an employee of the respondent for many years and that he believed he was being discharged solely on the basis of his age and that he was discriminated against by the respondent. Smith received petitioner's statements and thereafter told him to return when he had evidence that the defendant willfully discharged him. App. B, p. 17, *infra.* He told petitioner that he had two years in which to file suit if he found evidence of willfulness. App. B, p.

[1]As of July 1, 1979 the responsibility of enforcing the Age Discrimination in Employment Act was transferred from the Department of Labor to the Equal Employment Opportunity Commission. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979) *reprinted in* [1978] U.S. Code and Cong. News 9795.

17, *infra*. Mr. Smith also informed the petitioner that he would send him a booklet which contained information concerning age discrimination.

Thereafter, in October of 1979, prior to the expiration of two years from the time of his discharge, petitioner instituted this action praying for reinstatement in his former position and for damages and attorneys' fees.

B. Court Proceedings

The United States District Court for the Western District of North Carolina, pursuant to its jurisdiction under 29 U.S.C. §626(c) and 28 U.S.C. §1331, found that the respondent had intentionally discriminated against the petitioner on the basis of age and awarded reinstatement of the petitioner in his former employment in addition to back wages, liquidated damages and attorneys' fees. The court entered an order and opinion which stated the basis for the attorneys' fees, and the grounds for the denial of the defendant's motion for directed verdict. 538 F.Supp. 352; App. B, *infra*. The court held that the petitioner had complied with the requirements of 29 U.S.C. §626(d) in that he had filed a timely charge alleging unlawful discrimination. Furthermore, the court held that the notice period under the statute had been tolled by the respondent's failure to post notices required by law concerning the filing of age discrimination claims, and that the plaintiff had subsequently again complied with the requirements of 29 U.S.C. §626(d).

On May 31, 1983, the Fourth Circuit reversed the District Court's order. 708 F.2d 128; App. A, pp. 2-12, *infra*. The opinion stated: "Whirlpool asserts that Greene's

conversation w h Smith came far short of being a charge, and even if it did constitute a charge, it was not in writing as required by Section 626(d) and that therefore, this action must be dismissed. We agree with Whirlpool." App. A, p. 7, *infra*.

More specifically, the Fourth Circuit ruled:

(1) The court held that although 29 U.S.C. §626(d) "does not specify that a charge must be in writing", it concluded that a "*written charge* alleging unlawful discrimination must be filed within 180 days after the alleged unlawful practice occurred in order to comply with §626(d) of the ADEA as amended." App. A, p. 9, *infra*.

(2) The court held, furthermore, that the petitioner's statements to the agency employee alleging unlawful discrimination and discharge were insufficient to constitute a "charge" in that the Department of Labor enployee "did not believe that Greene charged Whirlpool with discrimination because he told him to return if he obtained information that Whirpool had discharged him because of of age." App. A, p. 7, *infra*.

(3) The court furher held: "we do not agree with the district court that the 180 day time period for filing a charge was tolled by Whirlpool's failure to post the required ADEA informational notices on its premises." App. A, p. 9, *infra*.

Judge Fairchild, although concurring in the result, filed a separate opinion in which he dissented from the view that 29 U.S.C. §626(d) required that a charge be in writing. He stated that "the term 'charge' was part of an amendment intended to make it more likely that courts would reach the merits of the case of aggrieved individuals." App. A, p. 12, *infra*. Since the legislative history was sparse and the legislation remedial, he concluded that he "would hold that unequivocal oral notice can satisy 626(d)." App. A, p. 12, *infra*.

On August 2, 1983, the Fourth Circuit denied rehearing, as well as a suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

There are two important questions arising in this civil action that warrant the grant of certiorari. The questions demonstrate a serious misapplication of an important federal statute and a disregard for the policies and principles underlying it. The erroneous application of the federal statute in question can be and should be reviewed and corrected by this Court.

1.

The decision below seriously erodes the private enforcement of the Age Discrimination in Employment Act [ADEA] and specifically undermines the purposes of the 1978 Amendments to the ADEA.

Stating that "age discrimination is often much less well understood than other forms of discrimination and therefore is often not discovered by the victim until long after the alleged act has occurred", Congress amended the ADEA "to strenghten and broaden its provisions" to "make it more likely that the courts will reach the merits of the cases of aggrieved individuals and do so more expeditiously." S.Rep. No. 493, 95 Cong., 2d Sess. 1,12, *reprinted in* [1978] U.S. Code & Ad. News 504, 515. Contrary to the result reached by the court of appeals below, congress intended the ADEA to be broad remedial legislation and in 1978 amended the statute to eliminate technicalities therein and provide greater accessibility to aged persons, and this is why certiorari should be granted.

Although Congress enacted the ADEA in 1967 to prevent discrimination against older individuals and amended the statute in 1978 "to stengthen and broaden its provisions", the decision below makes it much more difficult for the statute to serve its original purpose and erodes the amelioratory effects of the 1978 amendments. One of Congress' concerns in 1978 was that the requirements of U.S.C. §626(d), which required a notice of intent to sue to be filed with the Department of Labor within 180 days of the alleged discriminatory act, had caused courts to dismiss numerous otherwise meritorious claims. *Id.* at 12, *reprinted in* [1978] U.S. Code Cong. & Ad. News 515. Therefore, Congress adopted a lesser notice requirement: An individual need only file a charge alleging unlawful discrimination with the appropriate agency. 29 U.S.C. §626(d). The courts of appeals, however, has imposed a higher standard than the old "notice of intent to sue." Although 29 U.S.C. §626(d) now only requires a individual make a charge

alleging age discrimination to the appropriate authority, the court of appeals has engrafted an additional two part requirement onto the notice provision: (1) the "charge" must be in writing; (2) the agency employee receiving the information regarding the discrimination must subjectively believe or think that a "charge" is being made. App. A, pp. 7-9, *infra*. Ultimately the two part requirement will mean less access to the protections of the ADEA and thus weaken the enforcement of its prohibition. Thus, not only is the purpose of the amendment undone—broadening accessibility to the ADEA's protections, but the purpose of the statute—prohibition of age discrimination—is seriously eroded.

The notice provision of 29 U.S.C. 626(d) places a heavy burden on the victim of discrimination without the additional requirements created by the court of appeals. Read literally, the claimant must file a charge alleging discrimination "within 180 days after the alleged unlawful practice occurred." 29 U.S.C. 626(d). Congress thought that the notice provision, as written, caused layman sufficient difficulty to seriously consider "removing the 180 day notice requirement entirely". S. Rep. No. 493, 95 Cong., 2d Sess. 12 [1978], *reprinted in* [1978] U.S. Code & Ad. News 515. Although the notice provision was not abolished, it was, in Judge Fairchild's words, amended "to make it more likely that courts would reach the merits of the cases of aggrieved individuals." App. A, p. 12, *infra*. However, the decision below stands the amendment on its head—the merits are less likely to be reached.

Under the decision below, the aggrieved individual must first file a written charge. This means, presumably,

that even if an individual takes all the proper steps of notifying the appropriate agency in great detail of all the circumstances surrounding the discrimination, he or she will lose his or her rights simply because the statement is not in writing. Certainly, a full oral statement and interview with the appropriate agency complies with the letter and spirit of the notice provision much more fully than a short written statement stating a belief that one has been discriminated against. The court of appeals itself admits the only purpose of the notice provision is to afford the government an opportunity to conciliate. App. A, p. 8; *infra*. How is that underlying purpose better met by a writing? An oral statement to the appropriate agency serves the same purpose and can be more effective, particularly where the aggrieved party is illiterate or semi-literate.

Illiteracy is three (3) times as high for persons over the age of 45 (the ADEA covers persons between the ages of 40-70) as for the rest of the population of the United States.[2] Those aged persons who are illiterate are incapable of responding to the new requisite, made compulsory by the decision below, that a "charge" be written. Furthermore, approximately 28% of the United States population is between 40-70 years of age.[3] For a statistical breakdown of aged persons as a percentage of the population and as a percentage of the illiterate population see Appendix C. Aged persons are dependent on the provisions of the ADEA for protection from

---

[2]U.S. Bureau of the Census, *Statistical Abstract of the United States, 1982-83*, (103 ed.) Washington, 1982, p. 145.

[3]*Ibid.*, p. 27

arbitrary age discrimination. The decision below impacts adversely on these important protections for both the protected class, aged persons, and particularly the subclass, illiterate aged persons. Although the statute contains no mention of a requirement that the "charge" be written and the policy underlying the notice provision allows for oral notice, the decision below mandates a writing under all circumstances. This decision, if it is allowed to stand, erects another technical hurdle to those seeking the ADEA's protections, a hurdle of which they are likely to be unaware particularly after they have given otherwise sufficient oral notice. Therefore, the requirement that the "charge" be written foisted upon §626(d) will seriously hinder private enforcement of the prohibitions of the ADEA.

The second part of the new test is also unworkable and will cause great difficulties in obtaining relief from age discrimination. The decision of the court below requires that the government employee receiving the information must "believe" the person has "charged" the offending party "with discrimination." App. A, p. 7, *infra*. There is no such subjective determination required of the appropriate agency in the statute itself. The statute simply requires that "a charge alleging unlawful discrimination" be filed. 29 U.S.C. §626(d). Since the statute is clear, and the court below states that Greene told the agency employer he believed he had been discriminated against and discharged by on the basis of age, the court of appeals decision requires more. App. A, pp. 7-8, *infra*. Therefore, the layman who has stated (or written for that matter) that he has been discriminated against by a particular party must persuade the agency employee to whom he or she happens to contact that he or she is, in fact, making "a

charge"; of, if Judge Fairchild's approach is adopted, he or she must make sure the charge is "unequivocal." App. A, p. 10, *infra*. When does the charge become unequivocal or the government employee become subjectively convinced? Surely it asks considerable appreciation of legal niceties for a layman to know when he has become equivocal or unequivocal in his "charge". Furthermore, there is no ground in the statute or case law which supports the view of the court of appeals that the subjective impression of the governmental employee is controlling or even important. It is simply a question of law, not one of the impression of a clerk. However, given the decision below, countless aged laymen will lose their rights by equivocating or being less than equivocal or by their failure to adequately stir a government employee; therefore, the ultimate beneficiary of the decision below is the discriminator, not the discriminated.

Not only do the conclusions of the court of appeals undermine the purpose of the statute, but the analysis contained in its opinion is suspect. This Court has stated that in interpreting federal statutes its purpose is to divine the intent of Congress and has primarily focused on three indica of that intent: 1) the language of the statute; 2) the legislative history of the statute; 3) the policies underlying the statute. *Mahasco Corp. v. Silver*, 447 U.S. 807, 816 (1980). However, the court of appeals fails to apply this basic framework analysis in this case, which is simply a question of statutory interpretation.

The language of the statute itself neither addresses the question of whether a charge should be in writing, nor does it pass upon the verbage necessary to constitute a

charge. There is little in the legislative history which sheds light on the first point, except that the House Conference Report includes a statement that "the 'charge' requirement will be satisfied by the filing of a written statement." House Conf. Report No. 95-950, March 14, 1978, 12, *reprinted in* [1978] U.S. Code Cong. and Ad. News, 1806. Although this unquestionably is pertinent legislative history, it raises more questions than it provides answers. This language does not appear in the statute, and it is unclear whether the report is talking about one way it envisions the "charge" to be filed or the only way to file a charge. It is not clear whether the writer(s) of the report were stating a minimum method of disclosure by the individual to comply with the statute or one method of many of meeting the requirements of §626(d). The court of appeals failed to take note of the fact that numerous lower federal courts had interpreted the more rigorous "intent to sue" standard to be satisfied by oral notice. *E.g.*, *Woodford v. Kinney Shoe Corp.*, 369 F.Supp. 911 (N.D. Ga. 1973). Since Congress failed to add the requirement of a written charge in 1978 and Congress is presumed to be aware of relevant court decisions, *Cannon v. University of Chicago*, 441 U.S. 677, 696-698 (1979), there is strong evidence that Congress intended the law to remain the same and the legislative history merely stated a preference for a written charge. Given that the position of the court of appeals—total capitulation to the ambiguous statement in the legislative history—is inconsistent with the policies underlying the statute, these several lines of legislative history are a very thin reed upon which to construct a roadblock to claims made under an important federal statute.

However, on the second point, the language necessary to constitute a "charge", the legislative history is more specific and the court of appeals below disregarded or overlooked the specific statement of Congress as to the definition of a "charge", although the definitive language was contained in the court's opinion. App. A, p. 9, *infra*. The definition of a charge was stated in the Conference Committee's report as follows:

> The Conferees intend that the 'charge' requirement will be satisfied by the filing of a written statement *which identifies the potential defendant and generally describes the action believed to be discriminatory.*

H.R. No. 95-950, 95th Cong., 2d Sess. 12, *reprinted in* [1978] U.S. Code Cong. & Ad. News 534 (emphasis added).

The court of appeals failed to consider or discuss one crucial indicia of legislative intent—the policy underlying the statute. Here, this is doubly important as the policy underlying the statute must be construed along with the policy and purpose of the amendment. The policy underlying the ADEA is essentially remedial, and "the statute is to be construed liberally to achieve its purpose of protecting older employees from discrimination. . . . A procedural requirement of the Act, of doubtful meaning in a given case, should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act." *Moses v. Falstaff Brewing Corporation*, 525 F.2d 92, 93-94 (8th Cir. 1975). The decision below not only fails to take into account the policies underlying the statute, but stands in contradiction to those purposes.

When the additional requisites created by the court of appeals are added to its holding disregarding employer's failure to post statutory notices regarding the ADEA, it is apparent the decision below significantly narrows the scope and coverage of the ADEA simply on technical grounds at the expense of the rights created thereunder. Contrary to this Court's admonition in *Love v. Pullman*, 404 U.S. 522, 527 (1972), to avoid creating the "additional technicality," the court of appeals has done more than that—it has created several additional technicalities. "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Id.* at 528.

An example demonstrates the inherent lack of internal logic of the decision below. One person, who is illiterate or semi-literate, after becoming a victim of age discrimination, visits the appropriate notice agency and gives a detailed history of the job he has held (or applied for), the acts of discrimination involved, the persons involved, and presents documentary evidence in writing of the discriminatory act or acts (rather than a written charge). He or she cannot avail themselves of the protection of the ADEA, under the decision below, because he or she has failed to make a written "charge". It would make no difference how much information was provided or how many written documents were produced, the admittedly victimized individual would have no recourse. Under the decision below, it would make no difference if there were no statutory notices posted at his or her place of employment or if he or she were illiterate and could not write a word. A second person could, under the court of appeals decision, make a written statement alleging all the requisites of §626(d), but if the employee receiving the "charge" did not

believe that he was making a "charge", then he or she would lose his or her rights. However, if a third person made a one line written statement and the government clerk receiving the statement believed a "charge" had been made—"presto," a "charge" exists.

In light of these results, the Fourth Circuit's holding contrary to the language of the statute, the purposes of the statute and congressional intent should not go unreviewed and unchallenged.

2.

The decision below causes confusion in the interpretation of the ADEA by conflicting with the precedents of this Court and the decisions in and of other circuits.

The court of appeals held that 29 U.S.C. §626(d) required "that a *written charge* alleging unlawful discrimination must be filed within 180 days of the alleged unlawful practice occurred in order to comply with §626(d)," and that the 180 day time period of §626(d) was not tolled by the respondents "failure to post the required ADEA informational notices on its premises." App. A, p. 9, *infra*. Not only does the analysis underlying this statutory interpretation conflict with the precedents of this Court, the holdings themselves conflict with interpretations of the ADEA by other circuits and courts. The confusion caused by this decision should be undone, and this is why certiorari should be granted.

There are two fundamental points on which the decision below conflicts with decisions of other circuits

and courts. Although the court of appeals admitted that under "exceptional circumstances" the requirements of §626(d) could be "tolled or waived," it held that the respondent's failure to post informational notices required by the ADEA did not toll the provision. App. A, p.9, *infra*. However, the Seventh Circuit held in *Kephart v. Institute of Gas Technology*, 581 F.2d 1287, 1289 (7th Cir. 1978), *cert. denied*, 450 U.S. 959 (1981), and again in *Posey v. Skyline Corporation*, 702 F.2d 102, 105 (7th Cir. 1983) that the failure to post informational notices automatically tolled the 180-day period. The contrast between the two holdings is stark:

Seventh Circuit's holding in Posey

> [T]o insure that employers would not breach the posting requirement without penalty, as well as to effectuate the remedial purposes of the ADEA, we concluded in *Kephart* that the 180-day period was tolled by an employer's failure to post a conspicuous notice of ADEA rights (702 F.2d at 105).

Fourth Circuit's holding in Greene

> [W]e do not agree with the district court that the 180-day time period for filing was tolled by Whirlpool's failure to post the required ADEA informational notices on its premises. (App. A, p.9, *infra*).

Therefore, the decisions of the two circuits are completely at odds, and certiorari should be granted to resolve the conflict.

The decision below also conflicts with the decisions in and of other circuits on the issue of whether the "charge" must be in writing. Numerous district courts have held that §626(d) does not require the "charge" (or "notice of intent to sue" under the prior law) to be written. *E.g., Noto v. J.F.D. Electronics Corp.*, 446 F. Supp. 92 (E.D.N.C. 1978). Given that a number of district courts have held that oral notice is sufficient to constitute a "charge", the decision will add additional confusion to an already murky area of the law. When these decisions are added to the opinion of the Eighth Circuit in *Jennings v. American Postal Workers Union*, 672 F.2d 712 (8th Cir. 1982) which holds, at least by implication, that a "charge" may be oral under Title VII's analogous 180 day requirement, review and correction of the decision below becomes even more crucial.

Not only does the decision below conflict sharply with other courts and circuits, it contravenes principles enunciated by this Court in the area of statutory construction. Since there is no precise statutory language which addresses either the written/oral question or the exact contents of the "charge", the interpreting court is to be guided by the intent of Congress which intent is to be discerned from the policy underlying the statute, its purposes, as well as jurisprudential considerations of equity and fairness. *Philbrook v. Clodgett*, 421 U.S. 707, 713-714 (1975). Although legislative history is a part of that consideration, the court is to examine and apply the statute as a whole, taking into account its full impact and implication. *Id.*; *See also Cannon v. University of Chicago*, 441 U.S. 677 (1979). The decision below fails to make even the most rudimentary inquiry into the factors enunciated by this Court, and this is a disturbing precedent in both the area of statutory construction

and the application of an important federal statute which should not go unreviewed.

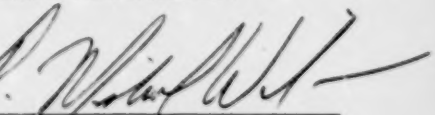
If the court of appeals' decision is allowed to go unreviewed, technical form will not only destroy substantive rights but the confusion which ensues will be time consuming, debilitating and cause further destruction of substantive rights. To prevent this confusion, certiorari should be granted.

CONCLUSION

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GERDES, MASON, BRUNSON
& WILSON
Suite 1001
Cameron Brown Building
301 South McDowell Street
Charlotte, North Carolina 28204
Telephone: (704) 372-3180

By 
C. MICHAEL WILSON
[Counsel of Record]
and J. DAVID TOLBERT
Attorneys for Petitioner
Calvin Coolidge Greene

CERTIFICATE OF SERVICE

The undersigned certifies that he has this day served the foregoing Petition for Certiorari and three copies by depositing the said copies thereof with first class postage prepaid affixed thereto on the 25 day of October, 1983 in the United States Post Office at Charlotte, North Carolina, pursuant to Supreme Court Rule 28.3, on counsel for respondent, at counsel for the respondent address:

Julia V. Jones
Moore, Van Allen and Allen
3300 NCNB Plaza
Charlotte, North Carolina 28280

This the 25 day of October, 1983.

C. Michael Wilson

Appendix

APPENDIX A

[FILED AUG 2 1983]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1635

Calvin Coolidge Greene,

Appellee,

versus

Whirlpool Corporation,

Appellant.

ORDER

Upon consideration of the appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Widener, Jr., Judge Hall and Judge T. E. Fairchild (7th Cir.).

For the Court,

/s/ William K. Slate, II
CLERK

Calvin Coolidge GREENE, Appellee,

v.

WHIRLPOOL CORPORATION,
Appellant,

No. 82-1635.

United States Court of Appeals,
Fourth Circuit.

Argued Feb. 10, 1983.

Decided May 31, 1983.

Discharged employee sued employer charging violation of Age Discrimination in Employment Act. The United States District Court for the Western District of North Carolina, James B. McMillan, J., 538 F.Supp. 352, rendered judgment on jury verdict for former employee, and employer appealed. The Court of Appeals, K.K. Hall, Circuit Judge; held that: (1) written charge alleging unlawful discrimination must be timely filed with the agency, and (2) the 180-day period was not tolled by employer's failure to post informational notices as employee had actual knowledge of the 180-day filing requirement.

Reversed.

Fairchild, Senior Circuit Judge, sitting by designation, filed concurring opinion.

1. Civil Rights —33

Written charge alleging unlawful discrimination must be filed within 180 days after the alleged unlawful practice occurred in order to comply with Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §7(d), as amended, 29 U.S.C.A. §626(d).

2. Civil Rights —38

Requirement of Age Discrimination in Employment Act that charge be filed with the agency within 180 days after alleged unlawful practice occurred is not a jurisdictional prerequisite to suit in federal court and under exceptional circumstances may be tolled or waived. Age Discrimination in Employment Act of 1967, §7(d), as amended, 29 U.S.C.A. §626(d).

3. Civil Rights —33

The 180-day period for filing administrative charge under Age Discrimination in Employment Act was not tolled by employer's failure to post required informational notices on its premises where from employee's first visit to Department of Labor he acquired actual notice of fact that a charge must be filed within that period. Age Discrimination in Employment Act of 1967, §7(d), as amended, 29 U.S.C.A. §626(d).

John T. Allred, Charlotte, N.C. (Julia V. Jones, Moore & Van Allen, Charlotte, N.C., on brief), for appellant.

C. Michael Wilson, Charlotte, N.C. (Griffin, Gerdes, Mason, Brunson & Wilson, Charlotte, N.C., on brief), for appellee.

Before WIDENER and HALL, Circuit Judges, and FAIRCHILD,* Senior Circuit Judge.

K.K. HALL, Circuit Judge:

Whirlpool Corporation (Whirlpool) appeals from a judgment entered on a jury verdict for Calvin Coolidge Greene (Greene) in his suit alleging violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§621—634. The issue for our consideration is whether Greene filed a charge of discrimination within 180 days of his alleged unlawful discharge as required under §626(d) of the ADEA, as amended. The district court held that a timely charge had been filed. We disagree, and therefore, reverse the judgment below.

I.

Greene was discharged from his job with Whirlpool on October 31, 1977. Approximately two weeks later, on either November 17 or 18, 1977, Greene went to the Charlotte, North Carolina office of the United States

*Honorable Thomas E. Fairchild, Senior Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

Department of Labor (DOL),[1] where he spoke with DOL employee Bob Smith. Greene testified at trial that he told Smith, "that I had worked for the Whirlpool Corporation all these years and that my performance had been okay, as far as I could determine; that the only reason I could see that they discharged me was discriminating on age because I was six weeks past 55." Greene further testified that Smith told him he would be sent a booklet which explained discrimination cases, and then Smith stated "if you find out enough information on it [Greene's alleged discriminatory discharge] you get back with us." Greene acknowledged that he received and read the booklet mailed to him which contained the ADEA, as amended, including the requirement that a charge of discrimination must be filed within 180 days of the alleged unlawful practice.

In October, 1979, after his former supervisor, Spagnuolo, had obtained a $51,977 jury verdict against Whirlpool for age discrimination,[2] Greene returned to the DOL. He spoke with another DOL employee about filing an age discrimination suit against Whirlpool. However, the DOL files do not reveal any charge filed by Greene against Whirlpool or show any correspondence

---

[1]In 1977, when Greene was required to file a charge, the DOL was the enforcing agency for the ADEA. However, on July 1, 1979, the responsibility for enforcement of the ADEA was transferred to the Equal Employment Opportunity Commission (EEOC) Reorg Plan No. 1 of 1978, C.F.R. 321 (1979), reprinted in [1978] U.S. Code Cong. & Ad. News 9795.

[2]*Spagnuolo v. Whirlpool Corporation*, 467 F.Supp. 364 (W.D.N.C. 1979), *aff'd in part, rev'd in part* 641 F.2d 1109 (4th Cir. 1981).

between the DOL and Greene, other than a record showing that Greene was mailed a copy of the ADEA in November, 1977.

On October 26, 1979, Greene instituted this age discrimination suit. Whirlpool's main defense was that Greene had not filed a charge with the DOL within 180 days after this alleged unlawful discharge, as required by the statute. The district court, however, was not persuaded by this contention and concluded that Greene had filed a timely charge during his first visit to the DOL in November, 1977, and had thereby sufficiently complied with the 180-day notice requirement of §626(d). Moreover, the district court found that Whirlpool, from 1977 through 1979, had failed to post the required ADEA informational notices on its premises in Charlotte, North Carolina, including the requirement that a charge be filed within 180 days. The district court, therefore, concluded that even if Greene's 1977 visit to the DOL did not meet the charge requirement of the statute, circumstances warranted tolling the 180-day filing period until September, 1979, when Greene retained an attorney and acquired actual knowledge of his rights. Further, the district court held that Greene's visit to the DOL in October, 1979, represented a second timely filing of a charge.

The jury thereafter returned a verdict for Greene. In addition, the district court awarded Greene liquidated damages, costs and attorneys' fees and ordered Wirlpool to reinstate Greene to a position equal to the one from which he had been discharged. From the judgment entered in favor of Greene, Whirlpool appeals.

II.

On appeal, the pivotal inquiry is whether the lower court correctly determined that Greene filed a charge alleging unlawful discrimination with the DOL within 180 days of his discharge. Greene contends that he filed an oral charge of discrimination during his first visit to the DOL. In contrast, Whirlpool asserts that Greene's conversation with Smith came far short of being a charge, and that even if it did constitute a charge, it was not in writing as required by §626(d); and that therefore, this action must be dismissed. We agree with Whirlpool.

The express language of §626(d) of the ADEA, as amended in 1978, requires the filing of a charge. This section reads, in pertinent part:

> (d) No civil action may be commenced under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred . . .

In the present case, Greene, on his initial visit to the DOL merely mentioned to Smith, a DOL employee, that he thought he had been discriminated against because of his age. Obviously, Smith did not believe that Greene charged Whirlpool with discrimination because he told him to return if he obtained information that Whirlpool had discharged him because of his age. Moreover, Greene himself could not have believed that he filed a charge at that time or he would not have

returned to the DOL in October, 1979. Hence, Greene's initial visit to the DOL was simply a request for information concerning age discrimination and nothing more.

Important to our consideration is the underlying purpose of §626(d), and the legislative history is instructive in this regard. Prior to 1978, §626(d) required that a "notice of intent to sue" be filed with the DOL. In 1978, this provision was amended to require that a "charge alleging unlawful discrimination" be filed with the DOL.[3] In approving this amendment, the Conference Committee reported:

> This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation.

H.R. No. 95-950, 95th Cong., 2 Sess. 12, *reprinted in* [1978] U.S.Code Cong. & Ad. News 504, 534. In the present case, because the Secretary had no knowledge of Greene's allegation of discrimination against Whirlpool, no opportunity existed for any informal methods of conciliation, conference and persuasion, as required by

---

[3]This amended version is effective "with respect to civil actions brought after the date of enactment of this act [April 6, 1978]" Public Law 95-256, Section 4(b)(2). Therefore, it is applicable to the instant case, which was filed on October 26, 1979.

§626(b), before the initiation of the suit. This is patently contrary to the purpose of the notice requirement.

[1] Furthermore, although §626(d) does not specify that a charge must be in writing, the Conference Committee's report is again enlightening. It states: "The conferees intend that the 'charge' requirement will be satisfied by the *filing of a written statement* which identifies the potential defendant and generally describes the action believed to be discriminatory." *Id.* (emphasis added). We find, as did the Second Circuit, in *Reich v. Dow Badische Co.*, 575 F.2d 363 (2d Cir.), *cert. denied* 439 U.S. 1006, 99 S.Ct. 621, 58 L.Ed.2d 683 (1978), when considering the earlier version of the statute, that §626(d), by requiring a charge to be filed, implies that it must be written. We therefore conclude that a *written charge* alleging unlawful discrimination must be filed within 180 days after the alleged unlawful practice occurred in order to comply with §626(d) of the ADEA, as amended.

[2, 3] We recognize that the 180-day provision of §626(d) is not a jurisdictional prerequisite to a suit in federal court, and may under exceptional circumstances be tolled or waived. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1981). Nevertheless, we do not agree with the district court that the 180-day time period for filing a charge was tolled by Whirlpool's failure to post the required ADEA informational notices on its premises. The evidence clearly reveals that from Greene's first visit to the DOL in November, 1977, he acquired actual knowledge of the fact that a charge alleging discrimination must be filed with the DOL within 180 days after the alleged unlawful practice occurred. Therefore, under these

circumstances, there is nothing to warrant the tolling of the usual 180-day filing requirement.

III.

For the reasons stated, we conclude that Greene's failure to comply with §626(d) is a bar to maintaining this action. Therefore, the other issues raised by Whirlpool on appeal need not be addressed. Accordingly, we reverse the judgment of the district court.

REVERSED.

FAIRCHILD, Senior Circuit Judge, concurring.

In substance, the district court found that Greene's conversation with Smith at the Department of Labor was, although oral, an unequivocal assertion, or "charge," that defendant had discriminated against Greene on account of age. In the light of all the circumstances, I agree that the finding of an unequivocal oral charge was clearly erroneous. I also agree that a case was not made out for tolling the 180 day filing requirement.

There having been no unequivocal oral charge of age discrimination, it seems unnecessary to decide whether a charge of age discrimination must be presented in writing in order to have been "filed." *Cf.* the fact situation presented in *Dickerson u Deluxe Check Printers, Inc.*, 703 F.2d 276, 283-84 8th Cir.1983).

If, however, the matter of written versus oral form is to be decided, it seems to me that the reasons

for deeming an unequivocal oral charge sufficient preponderate.

Judge, now Chief Judge, Feinberg stated those reasons well in dissent in *Reich v. Dow Badische Co.*, 575 F.2d 363, 375-76 (2d Cir.1978).

> It must be conceded at the outset that use of the word "filed" implies that the notice should be in writing. But the section does not make that requirement explicit and there are compelling reasons for not reading it into the statute. The ADEA is remedial legislation whose enforcement in large part depends upon the efforts of laymen. The terms of this statute should be liberally construed ... to avoid frustating potentially meritorious claims on hypertechnical grounds. See *Bonham v. Dresser Industries, Inc.* 569 F.2d 187, 193 (3rd Cir.1977); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92, 93-94 (8th Cir.1975); cf. *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S.CT. 616 [619], 30 L.Ed.2d 679 (1972) (Title VII case). Moreover, the sparse legislative history on this point indicates that unequivocal oral notice should be sufficient. The Act as a whole reflects "a congressional desire to avoid some of the administrative logjams experienced under Title VII" and to simplify enforcement mechanisms. Comment, Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act, 44 U.Chi.L.Rev. 457, 467 (1977).... See also 133 Cong. Rec. 7076 (1967) testimony of Sen. Javits before the Labor Subcommittee of the Senate Labor and Public Welfare Committee regarding the ADEA). Thus, in enacting the ADEA, Congress declined to require that notice "shall be in writing under oath

or affirmation . . . ," as was done in Title VIII, 42 U.S.C. §2000e-5(b). Additionally, the Department of Labor, the agency charged with administering the ADEA, has urged that oral notice can satisfy section 626(d). See Brief for the United States as Amicus Curiae, *Shell Oil Co. v Dartt*, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977) (leave to file denied). In light of the strong policy favoring a simplified construction of procedural requirements under the ADEA, the pertinent legislative history and the Department of Labor's administrative interpretation, I would hold that unequivocal oral notice can satisfy section 626(d). See, e.g., *Woodford v. Kinney Shoe Corp.*, 369 F.Supp. 911, 914 (N.D.Ga.1973); *Bishop v. Jelleff Assoc.*, 398 F. Supp. 579, 593 (D.D.C. 1974); and *Sutherland v. SKF Industries, Inc.*, 419 F.Supp. 610, 615-16 (E.D.Pa.1976).

Reich involved the statute when it required filing of a "notice of intent to sue." The change to the term "charge" was part of an amendment intended to make it more likely that courts would reach the merits of the case of aggrieved individuals. S.Rep. No. 493, 95th Cong. 1st Sess. 12, reprinted in [1978] U.S.Code Cong. & Ad.News 515; H.Rep. No. 950, 95th Cong. 2d Sess. 12, reprinted in [1978] U.S.Code Cong. & Ad.News 533-34. Therefore the reasoning of Judge Feinberg applies even more forcefully now.

APPENDIX B

Calvin Coolidge GREENE, Plaintiff,

v.

WHIRLPOOL CORPORATION, Defendant.

No. C–C–79-329-M.

United States District Court,
W. D. North Carolina,
Charlotte Division.

May 7, 1982.

In an action under the Age Discrimination in Employment Act, the District Court McMillan, J., held that: (1) the employer's failure to post notices required under the Act tolled the 180-day limitation period: (2) the evidence established that the employer discriminated on the basis of age; and (3) the plaintiff's attorneys were entitled to recover fees in the amount of $42,500 and costs in the amount of $1,129.39.

Ordered accordingly.

1. Civil Rights—44(6)

In age discrimination action, evidence supported conclusion that employer knew of its requirement to post notice setting forth information appropriate to effectuate purposes of Age Discrimination in Employment Act, but nevertheless wilfully failed, during years 1977 through 1979, to post and keep posted those required notices. Age Discrimination in Employment Act of 1967, §7, 29 U.S.C.A. §626.

2. Civil Rights—34

The 180-day time period for filing charge under Age Discrimination in Employment Act was tolled by employer's failure to post required notices of Age Discrimination in Employment Act rights, and, therefore, time period did not begin to run until plaintiff retained attorney and acquired actual knowledge of his rights; charge filed approximately one month after plaintiff retained attorney was timely. Age Discrimination in Employment Act of 1967, §7(d), 29 U.S.C.A. §626(d).

3. Civil Rights—44(6)

Evidence was sufficient to sustain verdict in favor of plaintiff in age discrimination action. Age Discrimination in Employment Act of 1967, §2 et seq., 29 U.S.C.A. §621 et seq.

4. Civil Rights—46

In setting attorney fees under Age Discrimination in Employment Act, district court is required to consider same guidelines for setting fees as in Title VII actions. Age Discrimination in Employment Act of 1967, §§2 et seq., 7(b), 29 U.S.C.A. §§621 et seq., 626(b); Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. §2000e et seq.

5. Civil Rights—46

In age discrimination action, reasonable attorney fees in favor of prevailing plaintiff were $42,500, plus expenses in amount of $1,129.39.

C. Michael Wilson, Gerdes, Mason, Brunson & Wilson, Charlotte, N.C., for plaintiff.

John T. Allred, Moore & Van Allen, Charlotte, N.C., for defendant.

ORDER DENYING MOTION TO DISMISS FOR FAILURE TO FILE TIMELY CHARGE

McMILLAN, District Judge.

This action under the Age Discrimination in Employment Act was tried before this court and a jury beginning on March 22, 1982, and ending on March 25, 1982, when plaintiff received a jury verdict in his favor on all issues.

Defendant had earlier moved to dismiss plaintiff's complaint on the ground that plaintiff had failed to

comply with the notice requirements of 29 U.S.C. §626(d). That section requires a plaintiff to file a charge alleging unlawful discrimination with the Secretary of Labor within 180 days of the alleged discriminatory act. This court concluded that the plaintiff had complied with the provisions of Section 626(d) and in an order filed May 9, 1980, to which specific reference is made, denied defendant's motion to dismiss.

At trial, at the close of the plaintiff's evidence, the defendant moved for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure, on the ground that the plaintiff had failed to comply with the 180-day notice requirement of Section 626(d), and that the evidence was insufficient to support findings of discrimination. Defendant renewed said motions at the close of all the evidence. (The parties stipulated that the mixed questions of fact and law presented by defendant's motion for a directed verdict because of alleged failure to comply with §626(d) would be heard and decided by the court.)

The court, sitting without a jury, finds as facts and concludes as matters of law:

Plaintiff was discharged from his job with defendant on October 31, 1977, and his age was a causative or determining factor—a "but for" factor—in the defendant's decision to discharge him. Defendant's discriminatory conduct toward plaintiff was wilful and plaintiff's discharge was not effected in good faith.

Following his discharge, the plaintiff, in November, 1977, went to the Charlotte office of the United States

Department of Labor, where he met with Mr. Bob Smith. The plaintiff told Mr. Smith at that time that he had been fired from his job with Whirlpool Corporation on October 31, 1977, when he was just above the age of 55 years. The plaintiff further told Mr. Smith that he thought that the defendant had discharged him because of his age and that the defendant had discriminated against him because of his age. Mr. Smith received this information from the plaintiff and at that time told him to return to the Department of Labor when he had obtained evidence or information that the defendant had wilfully discharged him because of his age, and that he had two years from the time he was fired within which to do so. Mr. Smith further told the plaintiff that he would mail him a booklet about the Age Discrimination in Employment Act because the Department of labor was out of such booklets at the time. (Mr. Smith did thereafter mail to Mr. Greene such a booklet but the evidence does not show that Greene read and understood it, nor that, absent knowledge that defendant's actions were wilful, he should have known from the booklet that he had to file a charge right away.) Mr. Greene left the Department of Labor reasonably believing he had filed a charge alleging unlawful discrimination due to age.

Plaintiff retained counsel in September 1979. He did not obtain or learn of any evidence that the defendant had wilfully discharged him because of age until a few weeks before the trial in October, 1979, of the case known as *Spagnuolo v. Whirlpool Corporation*, 467 F.Supp. 364 (W.D.N.C. 1979), 641 F.2d 1109 (4th Cir.1981). The first evidence Mr. Greene had as to wilful action by the defendant was obtained by him in September and October, 1979, by reading the deposition taken in the *Spagnuolo*

case and talking to persons involved in that case. Mr. Greene then returned to the Department of Labor, where he informed Mr. Fred Carlock of the Charlotte Office of the United States Department of Labor of the evidence of the wilfulness on the part of the defendant which he had learned from the *Spagnuolo* case. Mr. Greene thereafter filed his suit, on October 26, 1979, five days before the two-year statue of limitations ran.

[1] Section 626 of the ADEA requires that:

> Every employer ... shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate effectuate the purposes of this Chapter.

The court finds that defendant knew of this posting requirement, but nevertheless wilfully failed, during the years 1977 through 1979, to post and keep posted on its premises in Charlotte, North Carolina, the required notices.

Section 626(d) of the ADEA, as amended in 1978, reads as follows:

> (d) No civil action may be commenced under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed —
>
> (1) within 180 days after the alleged unlawful practice occurred;. . . .

This amended version is effective "with respect to civil actions brought after the date of enactment of this act" (April 6, 1978). Public Law 95-256, Section 4(b)(2). Hence, it is applicable to this case, which was filed on October 26, 1979.

The Supreme Court recently held that the 180-day time limit for filing a charge of discrimination under Title VII is not jurisdictional but is in the nature of a statute of limitations, and therefore subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, — U.S. — , 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Congress intended the ADEA filing requirement also to be non-jurisdictional, and the courts have followed this view. See Conference Report on the 1978 Amendments to the ADEA, which states that

> The "charge" requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and therefore equitable modification for failing to file within the time period will be available to plaintiffs under the Act. 1978 U.S.Code Cong. and Admin.News 528.

SEE ALSO Wright v. State of Tennessee, 628 F.2d 949, 952-53 (6th Cir. 1980) *(en banc)*, and cases cited therein.

[2] The ADEA is remedial and humanitarian legislation. Congress gave to the courts the power "to grant such legal or equitable relief as may be appropriate to effectuate the purposes" of the act. 29 U.S.C. §626(b). This court concludes, therefore, that (1) plaintiff filed a charge of discrimination in November 1977, in his first visit to the Department of Labor; (2) the 180-day time

period for filing a charge was tolled by the defendant's failure to post required notices of ADEA rights; (3) this period did not begin to run until September, 1979, after plaintiff retained an attorney and acquired actual knowledge of his rights under the Act; and (4) plaintiff filed a second timely charge of discrimination in October, 1979, when he complained to the Labor Department a second time. *See e.g., Jennings v. American Postal Workers' Union*, 672 F.2d 712, 28 FEP Cases 518 (8th Cir. 1982) (Title VII case applying *Zipes* to construe employee's visit to the EEOC as the filing of a charge); *Dartt v. Shell Oil Company*, 539 F.2d 1256, 1260 (10th Cir. 1976).

Plaintiff complied with the provision of §626(d). Defenant's motion for a directed verdict on this ground is DENIED. The court will not re-phrase the anaiysis in its order of May 9, 1980, which has been incorporated by reference in this order. However, as stated in the May 9, 1980 order:

> In this case [*Spagnuolo v Whirlpool*], Mr. Spagnuolo filed a claim within the period during which Mr. Greene's filing was required under the statute. The information on which Mr. Greene might have based a decision to go to the Labor Department again and pursue the claim in some more aggressive manner was not accessible to Mr. Greene. Even lacking the knowledge of his supervisor's sworn testimony that Greene had been fingered for a fabricated bad work record and eventual firing because of his age, Mr. Greene went to Labor and told them he felt he had been fired because of his age. There is no evidence that

Mr. Greene was not in good faith either in posing his initial complaint or in deciding not to do more.

Whirlpool has been in court and has investigated and litigated the web of facts surrounding the firings or demotions of Mr. Spagnuolo, Mr. Greene and one further employee (Vance). Mr. Spagnuolo testified under oath that he had been told to fire Greene on trumped up evaluations because of Greene's age; it is hardly remarkable that Mr. Spagnuolo felt justified in filing charges against Whirlpool in no uncertain terms. Mr. Greene, a lower echelon employee who had no one to fire and no management friends who were privy to higher-level conversations, went no further than to complain in person to the Department of Labor. He went far enough.

[3] Defendant also contends the evidence was not sufficient to support a verdict of age discrimination. I cannot agree; the evidence of age discrimination, both direct and circumstantial, was strong; and the jury reached the correct result.

ACCORDINGLY, IT IS THEREFORE ORDERED:

1. This court has jurisdiction over this action.

2. There was ample evidence of unlawful discrimination against plaintiff based on his age.

3. There was sufficient compliance by the plaintiff with the 180-day notice period of Section 626(d) to

accomplish the statutory purpose of that section and the plaintiff filed a timely charge alleging unlawful discrimination during his first visit to the Department of Labor in November, 1977.

4. The 180-day notice period of Section 626(d) of the Age Discrimination in Employment Act is equitably tolled until September of 1979, and the plaintiff filed a second charge alleging unlawful discrimination during his second visit to the Department of Labor in October 1979.

5. The defendant's motion for directed verdict is denied.

ORDER ALLOWING ATTORNEYS' FEES

On this date, this court is entering a final judgment on the jury's verdict in favor of plaintiff in this action under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* Plaintiff's attorneys have filed a petition for an award of attorneys' fees and costs under 29 U.S.C. §626(b) and §216(b). Plaintiff is the prevailing party and is entitled to fees under these sections of the statute.

Plaintiff's primary trial counsel, Mr. C. Michael Wilson, has submitted an affidavit which itemizes the time spent and the costs that plaintiff's counsel have incurred. Both parties have briefed the issue of fees.

[4] In setting an attorney's fee under the Age Discrimination in Employment Act, the court is required

to consider the twelve guidelines for setting fee awards in Title VII actions. *See Spagnuolo v. Whirlpool*, 641 F.2d 1109, 1115 (4th Cir. 1981); *Walston v. School Board*, 566 F.2d 1201, 1204-05 (4th Cir. 1977). These guidelines were originally set out in the case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and adopted by the Fourth Circuit in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978).

In the recent case of *Anderson v. Morris*, 658 F.2d 246 (4th Cir. 1981), the Fourth Circuit reviewed the manner in which the *Johnson* factors are to be applied by the district court. A base amount for the fee award is to be determined by multiplying the number of hours reasonably expended on the case by the customary hourly rate of compensation (*Johnson* factors one and five). This amount may then be adjusted by the court upward or downward on the basis of the other ten *Johnson* factors to determine the final fee award.

1. *The time and labor expended.*—The affidavit of plaintiff's counsel demonstrates that, through the trial, which was concluded on March 25, 1982, three attorneys have worked a total of 468¾ hours on this case. There does not appear to have been any duplication of effort by the attorneys.

5. *Customary fee for like work.*—Plaintiff's attorneys have requested fees of $75.00 per hour for Mr. C. Michael Wilson, $75.00 per hour for Mr. James L. Mason, and $100.00 per hour for Mr. Phillip E. Gerdes. These rates are within the range of charges customarily made in this area for similar work.

The court thus determines initially that plaintiff is entitled to attorneys' fees of $35,356.25 (460¾ hours at $75 an hour plus 8 hours at $100 an hour).

2. *The novelty and difficulty of the questions raised.*—This case involved several unsettled legal questions, such as whether, under recent case law, plaintiff had met the statutory requirement that he file an administrative charge of discrimination prior to filing suit. In addition, the case involved sharply contested factual questions, which required plaintiff's attorneys to compile and present an extensive factual record. This factor justifies an upward adjustment of the fee award.

3. *The skill required.*—Plaintiff's attorneys were required to do extensive discovery, organize a substantial factual record, and conduct a four-day trial. In addition, they were required to brief and argue several difficult issues of law. Their work reflected a high level of skill and competence. The fee award is to be adjusted upward on the basis of this factor.

4. *The preclusion of other employment by the attorneys because they handled this case.*—This case has been pending for over two and a half years, and has precluded other employment by counsel to the extent that they devoted 468¾ hours to it.

6. *Whether the fee is fixed or contingent.*—This is a contingent fee case. The risks inherent in contingency fee litigation justify an upward adjustment in the attorneys' fee award.

7. *Time limitations imposed by the client or the circumstances.*—This factor does not seem particularly relevant.

8. *The amount involved and the results obtained.*—Plaintiff was vindicated by the jury's verdict on his claim of wrongful discharge. He has recovered $56,000.00 in lost income as a result of the wrongful discharge, as well as liquidated damages of $56,000.00 based upon the jury's finding (which the court adopts) that the actions of the defendant in discharging the plaintiff were wilful. In addition, the court has ordered that plaintiff be reinstated to the Charlotte territory sales position which he held prior to his demotion and discharge, with all financial and other benefits of that position. The court concludes from these results that plaintiff fully prevailed on his claims in this lawsuit. The fee award will be adjusted upward on the basis of this factor.

9. *Experience, reputation and ability of the attorneys.*—Plaintiff's attorneys are members of a five-man firm in Charlotte. Mr. Wilson, plaintiff's primary trial attorney, was admitted to the North Carolina Bar in 1976. Mr. Mason was admitted in 1972, and Mr. Gerdes was admitted in 1964. These attorneys have had substantial experience, and have tried many cases. They reflected this experience in the competent and able manner in which they tried this case.

10. *The undesirability of the case.*—Cases involving discrimination claims frequently arouse animosities. This case was no different. Such cases are often more taxing on the attorneys outside the courtroom than within it. They require arduous labor and tremendous

dedication. An upward adjustment is called for to reward plaintiff's counsel for their willingness to handle this case, and to encourage other attorneys to handle similar cases in the future.

11. *The nature and length of the professional relationship with the client.*—Plaintiff appears to be a one-time client for this case only. This factor has no effect on the award.

12. *Awards in similar cases.*—The award in this case is within the reasonable range of fees previously allowed in similar cases.

[5] The combined effect of these factors justifies an upward adjustment of attorneys' fees. The court finds reasonable attorneys' fees in this case to be $42,500.00.

Plaintiffs are also entitled to recover witness expenses, costs of depositions, copying, long distance telephone calls, and other miscellaneous expenses in the amount of $1,129.39.

IT IS THEREFORE ORDERED that defendant pay to plaintiff's counsel the following sums:

Attorneys' fees	$42,500.00
Expenses	1,129.39
Total	$43,629.39

APPENDIX C